FLOYD AND CORWIN SILVA

IBLA 75-248 Decided May 15, 1975

Appeal from decision of Administrative Law Judge Harvey C. Sweitzer denying application for nonuse of grazing privileges and allowing applicants two years to make active use of their grazing privileges or suffer loss of their base property qualifications. (Idaho 5-73-1).

Affirmed.

1. Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Cancellation and Reductions

A decision denying an application for 100% nonuse of grazing privileges and requiring applicants to initiate substantial active use within two years or suffer revocation of their base property qualifications will be affirmed where the applicant is not engaged in the livestock business, has not used his grazing privileges for many years, and where nonuse is not necessary for range conservation, animal health, or other justifiable cause.

APPEARANCES: Floyd Silva, pro se; Robert S. Burr, Esq., Office of the Field Solicitor, United States Department of the Interior, Boise, Idaho, for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Floyd and Corwin Silva appeal from the November 7, 1974, decision of Administrative Law Judge Harvey C. Sweitzer affirming the decision of the Manager of the Shoshone, Idaho, grazing district. That decision denied their application for further total nonuse of their grazing privileges and allowed them two years to make substantial active use of their privileges or suffer revocation of

their base property qualifications. The action taken by the District Manager was that which was recommended by the District Advisory Board.

Appellants have held grazing privileges in the Shoshone District for many years. However, their last active use of the federal range was in 1960, when they were entitled to 1901 animal unit months (AUM's). Since then they have sold and transferred a significant portion of their privileges, suffered some reduction by BLM, and surrendered their privileges to graze 600 head of sheep on nearby lands in the national forest.

In their latest application appellants again sought 100% nonuse for their total remaining entitlement of 812 AUM's. They assert that they could not profitably undertake an active grazing operation of such small size.

[1] A careful reading of the regulations reveals that such lengthy nonuse is not and should not be authorized. First, 43 CFR 4111.1-1 requires that an applicant be engaged in the livestock business. Judge Sweitzer found that appellants were not, and appellants have not challenged that finding in their appeal. Second, 43 CFR 4115.2-1(e) provides in part:

> (11) Nonuse, in whole or in part, of grazing privileges under a license or permit may be authorized by the District Manager, upon application by the licensee or permittee, after reference to the advisory board, for the following reasons: conservation and protection of the Federal range, annual fluctuations in livestock operations, or financial or other reasons beyond the control of the licensee or permittee.

Darrel Short, Area Manager for BLM, testified that adequate forage was available and that further nonuse of appellants' grazing privileges would not contribute to conservation of the range. The second criterion set forth in the quoted regulation is not pertinent here. Nor is the third criterion pertinent, since appellants' financial inability to operate economically with their present entitlement was caused by their own actions in selling or relinquishing a substantial portion of their grazing privileges. We also note that the BLM Manual states:

> Although 43 CFR 4115.2-1(e)(11) does not fix a time limit on authorization of nonuse, it should not be granted on a prolonged basis if conservation of the Federal Range or nonuse for other reasons is not justified as determined by the District Manager.

BLM Manual 4115.21B9a(3).

Appellants' protest, however, that they have had their number of AUM's reduced over the years, that they have contributed to a reseeding program and that, consequently, any excess AUM's should be returned to them before active use of their privileges is ordered. While officials of the BLM conceded that there may be surplus forage available, they indicated that only with full active use of grazing privileges by appellants and others could they determine whether the range would improve or decline.

Since appellants have been given the opportunity to utilize the results of earlier conservation practices, the decision of the District Manager requiring appellants to make active use of their privileges within 2 years is in accordance with 43 CFR 4115.2-1(e) which provides,

> (9) Base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:
>
> (i) To include in an application for a license or permit or renewal thereof, the entire base property qualifications for active, nonuse, or combination of active and nonuse, except where the base property qualifications are included in an outstanding current term permit, or where the allowable use has been reduced under PP 4111.4-3(a)(3) and (c), and 9239.3-2(e) of this chapter.
>
> (ii) To accept a license or permit issued pursuant to such application.
>
> (10) The failure for any two consecutive years to make substantial use as determined by the District Manager, after reference to the advisory board, of all or part of the grazing privileges authorized under a license or permit, may result in the revocation thereof and in the proportionate loss of the base property qualifications.

Appellants' contention that their continued nonuse is necessary to good range conservation practice was not sustained by evidence adduced at the hearing, nor was there any showing that such nonuse was dictated by considerations of animal health or other cogent factors.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Joan B. Thompson
Administrative Judge